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The Chief Executive
All Housing Authorities in England

Ref: HMEA

21 January 1994

Dear Chief Executive

COMPULSORY COMPETITIVE TENDERING OF HOUSING MANAGEMENT

Sir George Young, Minister for Housing, Inner Cities and Construction, today announced the publication of consultation drafts of the statutory instruments which will extend compulsory competitive tendering to council housing management and guidance to authorities on the avoidance of anti-competitive behaviour. I enclose copies of the draft instruments and guidance. The consultation period closes on 4 March 1994.

The draft instruments, which give effect to the decisions announced by the Minister on 26 November, cover the defined activity for housing management, properties affected, the timetable for implementation by individual authorities, the competition requirement and the *de minimis* threshold. The Department will be consulting separately on an instrument setting the rate of return for all services subject to compulsory competitive tendering, including housing management.

The Department indicated in the guidance for large scale voluntary transfers issued last month that where an authority wished to pursue the transfer option it would not be required to prepare for the compulsory competitive tendering of housing management at the same time. Where appropriate, authorities would be granted exemptions from competitively tendering the housing management service.

As regards other forms of transfer of stock (or management), such as leasehold enfranchisement, Tenants' Choice or delegation to tenant management organisations, Ministers have concluded that in general no exemptions should be required since authorities should be able to prepare for compulsory competitive tendering and transfers in parallel. However, where an authority can demonstrate that the timing of tenants' exercising their rights leads to exceptional difficulties for the authority's preparations for housing management CCT, the Department would be prepared to consider whether an exemption was appropriate.

Comments on the draft statutory instruments and guidance should be sent to James Gorringer, Housing Management Branch, Room

REFERENCE ONLY

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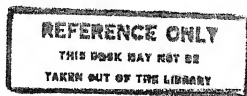


N13/16, Department of the Environment, 2 Marsham Street, London SW1P 3EB. Enquiries should also be addressed to Mr Gorringe (Tel: 071 276 3451; fax 071 276 3270).

I enclose an additional copy of this letter and enclosures for your chief housing officer.

Yours sincerely
Christopher Bowden

CHRISTOPHER BOWDEN
Housing Management and Estate Action Division



Draft of 19th January 1994

Draft Order laid before Parliament under section 2(3) of the Local Government Act 1988, for approval by resolution of each House of Parliament

DRAFT STATUTORY INSTRUMENTS

1994 No.

LOCAL GOVERNMENT, ENGLAND AND WALES

LOCAL GOVERNMENT, SCOTLAND

The Local Government Act 1988 (Competition)
(Defined Activities) (Housing Management) Order 1994

Made

1994

Coming into force

1994

The Secretary of State, in exercise of the powers conferred on him by sections 2(3), 15(7) and (8) of the Local Government Act 1988, and of all other powers enabling him in that behalf, after consultation with such representatives of local government as appear to him to be appropriate, hereby makes the following Order, a draft of which has been laid before, and has been approved by resolution of, each House of Parliament:

Citation and commencement

1. This Order may be cited as the Local Government Act 1988 (Defined Activities) (Housing Management) Order 1994 and shall come into force [on the day after the day on which it is approved by resolution of each House of Parliament].

Defined activities

2.-(1) Section 2(2) of the Local Government Act 1988 ("the Act") is amended by the addition at the end of the following:

" - housing management".

(2) Schedule 1 to the Act is amended by the addition at the end of the following:

"Housing Management

X.- 1 The provision of housing management services to a defined authority falls within section 2(2)(-) above, and consists of work involved in the following tasks -

- (a) dealing with applicants for tenancies of properties, including applicants for transfers (under section 91 of the 1985 Act) and assignments by way of exchange (under section 92 of that Act), after the property has been allocated to the applicant but before the tenancy agreement has been entered into;
- (b) assisting in the preparation and signature of tenancy agreements for any property;
- (c) informing tenants of the terms of such tenancy agreements and taking steps to enforce such agreements;
- (d) notifying tenants of rent and service charges payable;
- (e) collecting rents and service charges (excluding service charge loan payments), keeping suitable records of such payments, collecting arrears of rent or service charge, negotiating agreements for the payment of arrears of rent or service charge, and monitoring compliance with such agreements;
- (f) terminating tenancies and arranging for the vacating of properties;
- (g) inspecting vacant properties and arranging for the carrying out of any necessary works prior to the next

letting;

- (h) taking steps to prevent vandalism and unlawful occupation of vacant properties;
- (i) taking steps to remove unlawful occupants;
- (j) monitoring the condition of common parts of properties and arranging for the maintenance, repair, cleaning and clearance of such parts (including disinfestation to be carried out);
- (k) receiving requests from tenants for repairs to any property (including common parts), and arranging for suitable repairs to be carried out;
- (l) monitoring and reporting to the landlord on the performance of any contractor carrying out work falling within sub-paragraph (g), (j), (k) or o;
- (m) carrying out surveys and inspections of properties for the purposes of ascertaining the physical condition or state of repair of the properties;
- (n) dealing with tenant's repair claims;
- (o) dealing with applications for payments under section 100 of the 1985 Act;
- (p) operating reception and security services provided at the entrance to a building containing two or more dwellings;
- (q) responding to disturbances on or in any property and disputes between residents, including dealings with appropriate alternative dispute resolution agencies.

(2) In this paragraph -

"the 1985 Act" means the Housing Act 1985(a);
"authority" means a defined authority;
"housing accommodation" has the same meaning as in Part II of the 1985 Act, except that it does not include "hostels" as defined in section 622 of that Act;
"property" means -

- (i) housing accommodation, and
- (ii) buildings or land provided under section 12(1)(c) of the 1985 Act;

"service charge" has the same meaning as in section 621A of the 1985 Act(b);

"tenant's repair claim" has the same meaning as in the Secure Tenancies (Right to Repair) Scheme Regulations (1994)(c);

subject to paragraph (3), "tenancy" and "tenant" have the same meanings as in section 621 of the 1985 Act.

(3) In paragraph (1)(a), (f), (g), (i), (n) and (o) "tenancy" and "tenant" do not include a person who has a lease of a property in respect of which the right to buy under Part V of the 1985 Act has been exercised."

Conditions

3. For the purposes of section 2(2)(-) of the Act, section 2(6) is amended by the substitution for the words from "it is incidental" of the words "that employee spends less than 25% of his working hours engaged in that work".

(a) 1985 c.68.

(b) Section 621A was inserted by paragraph 39 of Schedule 5 to the Housing and Planning Act 1986 (c.63).

(c) S.I. [1994/---].

works contracts

4. Sections 4 and 5 of the Act shall have effect in respect of works contracts for work falling within section 2(2)(a) of the Act as if for the date 1st April 1989, wherever occurring in those sections, there were substituted 1st April 1996.

1994

Secretary of State
for the Environment

EXPLANATORY NOTE

(This note is not part of the Order)

Under Part I of the Local Government Act 1988, work falling within certain defined activities may only be carried out by defined authorities if it has previously been put out to tender in accordance with the provisions of the Act.

Article 2 of the Order, which extends to England, Wales and Scotland, amends the Act to add housing management to the existing defined activities.

Articles 3 and 4 make amendments to other provisions of the Act for the purposes of the new defined activity.

STATUTORY INSTRUMENTS

1994 No.

LOCAL GOVERNMENT, ENGLAND AND WALES

The Local Government Act 1988 (Competition)
(Housing Management) (England) Regulations 1994

<u>Made</u>	1994
<u>Laid before Parliament</u>	1994
<u>Coming into force</u>	1994

The Secretary of State, in exercise of the powers conferred on him by sections 6(3) and 15(6) of the Local Government Act 1988(a), and of all other powers enabling him in that behalf, hereby makes the following Regulations:

Citation, commencement, extent and interpretation

1.-(1) These Regulations may be cited as the The Local Government Act 1988 (Competition) (Housing Management) (England) Regulations 1994 and shall come into force on [1994].

(2) These Regulations apply in relation to defined authorities in England only.

(3) In these Regulations -

"the Act" means the Local Government Act 1988;

"the exempt proportion", in relation to any defined authority in any financial year, shall be determined in accordance with the Table in paragraph (5);

"the permitted period" for any defined authority means a period of five years from the date on which the work was awarded;

"the specified proportion", where the exempt proportion in accordance with the Table in paragraph (5) is 100%, is 0%; in any other case the specified proportion means the

(a) 1988 c.9.

proportion of the specified work calculated in accordance with the following formula -

$T = (A - B)$, where

T = the estimated total annual cost (including overheads) to a defined authority of carrying out the specified work,

A = the exempt proportion,

B = for the permitted period, an amount equal to the proportion of T which is being carried out by a defined authority following voluntary competitive tendering;

"specified work" means functional work of any description falling within the defined activity mentioned in section 2(2)(-) of the Act (housing management);

"voluntary competitive tendering" means the awarding of work, before [1st September 1994], following a competitive process in the course of which at least three persons who are not defined authorities were invited to tender for the work.

(4) For the purposes of the table in paragraph (5) defined authorities are divided into bands in accordance with the Schedule.

(5) The exempt proportion of specified work for any defined authority in any financial year is the percentage shown in the Table below against the appropriate Band in relation to the financial year in question:

	Financial year beginning 1st April 1996	Financial year beginning 1st April 1997	Financial year beginning 1st April 1998 and all subsequent financial years
Band I authorities	5%	5%	5%
Band II authorities	100%	5%	5%
Band III authorities	40%	5%	5%
Band IV authorities	100%	40%	5%
Band V authorities	60%	30%	5%

Application of section 6

2. Section 6 of the Act shall apply to the specified proportion of any specified work if it is proposed to be carried out on or after 1st April 1996.

1994

Secretary of State
for the Environment

BANDS INTO WHICH DEFINED AUTHORITIES FALL

1. "Band I authorities" means any defined authority which is not a Band II, III, IV or V authority.

2. "Band II authorities" means the following authorities:

the Council of the District of Adur
the Council of the District of Allerdale
the Council of the District of Alnwick
the Council of the District of Arun
the Council of the District of Aylesbury Vale
the Council of the Borough of Barrow in Furness
the Council of the Borough of Basingstoke and Deane
the Council of the District of Bassetlaw
the Council of the City of Bath
the Council of the Borough of Berwick upon Tweed
the Council of the Borough of Beverley
the Council of the London Borough of Bexley
the Council of the District of Blaby
the Council of the Borough of Blyth Valley
the Council of the District of Bolsover
the Council of the Borough of Boothferry
the Council of the Borough of Bournemouth
the Council of the Borough of Bracknell Forest
the Council of the District of Braintree
the Council of the Borough of Bury
the Council of the City of Cambridge
the Council of the District of Cannock Chase
the Council of the District of Caradon
the Council of the District of Carrick
the Council of the Borough of Castle Morpeth
the Council of the District of Castle Point
the Council of the Borough of Charnwood
the Council of the Borough of Chelmsford
the Council of the District of Cherwell
the Council of the District of Chester le Street
the Council of the Borough of Chorley
the Council of the Borough of Colchester
the Council of the District of Corby
the Council of the District of Craven
the Council of the Borough of Crewe and Nantwich
the Council of the Borough of Dacorum
the Council of the District of Derbyshire Dales
the Council of the District of Derwentside
the Council of the City of Durham
the Council of the District of East Cambridgeshire
the Council of the District of East Devon
the Council of the District of East Dorset
the Council of the District of East Hertfordshire
the Council of the District of East Staffordshire
the Council of the Borough of Elmbridge
the Council of the District of Epping Forest

the Council of the Borough of Fylde
the Council of the Borough of Gillingham
the Council of the Borough of Glanford
the Council of the Borough of Gravesham
the Council of the Borough of Great Grimsby
the Council of the Borough of Great Yarmouth
the Council of the Borough of Guildford
the Council of the Borough of Halton
the Council of the District of Hambleton
the Council of the London Borough of Harrow
the Council of the District of Hart
the Council of the Borough of Hartlepool
the Council of the Borough of Havant
the Council of the Borough of Hertsmere
the Council of the Borough of High Peak
the Council of the Borough of Hinckley and Bosworth
the Council of the Borough of Holderness
the Council of the District of Horsham
the Council of the District of Huntingdonshire
the Council of the Borough of Kettering
the Council of the Borough of King's Lynn and West Norfolk
the Council of the London Royal of Kingston upon Thames
the Council of the District of Leominster
the Council of the City of Lincoln
the Common Council of the City of London
the Council of the District of Maldon
the Council of the Borough of Medina
the Council of the District of Mendip
the Council of the District of Mid Sussex
the Council of the District of Mole Valley
the Council of the Borough of Newcastle under Lyme
the Council of the District of North Cornwall
the Council of the District of North Dorset
the Council of the District of North East Derbyshire
the Council of the District of North Kesteven
the Council of the District of North Shropshire
the Council of the Borough of North Warwickshire
the Council of the Borough of Nuneaton and Bedworth
the Council of the Borough of Preston
the Council of the Borough of Reading
the Council of the London Borough of Redbridge
the Council of the Borough of Reigate and Banstead
the Council of the Borough of Restormel
the Council of the Borough of Ribble Valley
the Council of the District of Richmondshire
the Council of the Borough of Rugby
the Council of the Borough of Runnymede
the Council of the Borough of Rushcliffe
the Council of the City and District of Saint Albans
the Council of the District of Sevenoaks
the Council of the Borough of Shrewsbury and Atcham
the Council of the District of South Bedfordshire
the Council of the District of South Buckinghamshire
the Council of the District of South Cambridgeshire
the Council of the District of South Holland
the Council of the District of South Norfolk
the Council of the District of South Oxfordshire
the Council of the District of South Staffordshire

the Council of the Borough of South Wight
 the Council of the Borough of Southend on Sea
 the Council of the District of Staffordshire Moorlands
 the Council of the District of Suffolk Coastal
 the Council of the District of Tandridge
 the Council of the Borough of Taunton Deane
 the Council of the District of Tendring
 the Council of the Borough of Tewkesbury
 the Council of the Borough of Thamesdown
 the Council of the Borough of Thurrock
 the Council of the Borough of Tonbridge and Malling
 the Council of the Borough of Trafford
 the Council of the District of Tynedale
 the Council of the District of Uttlesford
 the Council of the District of Vale of White Horse
 the Council of the District of Wansbeck
 the Council of the District of Warwick
 the Council of the Borough of Watford
 the Council of the Borough of Wellingborough
 the Council of the District of West Lindsey
 the Council of the District of West Oxfordshire
 the Council of the Borough of Woking
 the Council of the District of Woodspring
 the Council of the City of Worcester
 the Council of the District of Wycombe and
 the Council of the City of York.

3. "Band III authorities" means the following authorities:

the Council of the London Borough of Barnet
 the Council of the Borough of Barnsley
 the Council of the Borough of Bolton
 the Council of the London Borough of Brent
 the Council of the City of Coventry
 the Council of the City of Derby
 the Council of the London Borough of Haringey
 the Council of the London Borough of Havering
 the Council of the London Borough of Hillingdon
 the Council of the Borough of Knowsley
 the Council of the Borough of Milton Keynes
 the Council of the Borough of North Tyneside
 the Council of the City of Norwich
 the Council of the City of Plymouth
 the Council of the City of Portsmouth
 the Council of the Borough of Rochdale
 the Council of the Borough of Saint Helens
 the Council of the Borough of South Tyneside
 the Council of the City of Southampton
 the Council of the City of Westminster
 the Council of the Borough of Wirral and
 the Council of the District of The Wrekin.

4. "Band IV authorities" means the following authorities:

the Council of the London Borough of Barking and Dagenham
 the Council of the London Borough of Croydon

the Council of the Borough of Doncaster
the Council of the London Borough of Ealing
the Council of the District of Easington
the Council of the London Borough of Enfield
the Council of the London Borough of Hammersmith and Fulham
the Council of the London Borough of Hounslow
the Council of the Borough of Middlesbrough
the Council of the Borough of Northampton
the Council of the Borough of Oldham
the Council of the Borough of Sefton
the Council of the Borough of Stockton on Tees
the Council of the City of Stoke on Trent
the Council of the Borough of Tameside
the Council of the London Borough of Waltham Forest and
the Council of the Borough of Wigan.

5. "Band V authorities" means the following authorities:

the Council of the City of Birmingham
the Council of the City of Bradford
the Council of the City of Bristol
the Council of the London Borough of Camden
the Council of the Borough of Dudley
the Council of the Borough of Gateshead
the Council of the London Borough of Greenwich
the Council of the London Borough of Hackney
the Council of the London Borough of Islington
the Council of the City of Kingston upon Hull
the Council of the Borough of Kirklees
the Council of the London Borough of Lambeth
the Council of the City of Leeds
the Council of the City of Leicester
the Council of the London Borough of Lewisham
the Council of the City of Liverpool
the Council of the City of Manchester
the Council of the City of Newcastle upon Tyne
the Council of the London Borough of Newham
the Council of the City of Nottingham
the Council of the Borough of Rotherham
the Council of the City of Salford
the Council of the Borough of Sandwell
the Council of the City of Sheffield
the Council of the London Borough of Southwark
the Council of the City of Sunderland
the Council of the London Borough of Tower Hamlets
the Council of the City of Wakefield
the Council of the Borough of Walsall
the Council of the London Borough of Wandsworth and
the Council of the Borough of Wolverhampton.

EXPLANATORY NOTE

(This note is not part of the Regulations)

Section 6(3) of the Local Government Act 1988 enables the Secretary of State to require that an authority mentioned in section 1(1) of the Act (a defined authority) may only carry out functional work falling within an activity listed in section 2(2) of the Act (a defined activity) after subjecting the work to competition.

These Regulations require all defined authorities to subject work falling within the activity of housing management to competition. Defined authorities are placed in one of five bands, and the proportion of work which has to be subjected to competition in any financial year is dependent upon the band in which the authority falls and the amount of work, if any, which the authority has voluntarily subjected to competition.

STATUTORY INSTRUMENTS

1994 No.

LOCAL GOVERNMENT, ENGLAND AND WALES

The Local Government Act 1988 (Defined Activities)
(Exemptions) (England) (Amendment) Order 1994

Made	1994
Laid before Parliament	1994
Coming into force	1994

The Secretary of State for the Environment, in exercise of the powers conferred upon him by sections 2(9) and 15(5) of the Local Government Act 1972(a) and of all other powers enabling him in that behalf, hereby makes the following Order:

Citation and commencement

1. This Order may be cited as the Local Government Act 1988 (Defined Activities) (Exemptions) (England) (Amendment) Order 1994 and shall come into force on [] 1994.

Amendment of Local Government Act 1988 (Defined Activities) (Exemptions) (England) Order 1988

2. Article 3(2) of the Local Government Act 1988 (Defined Activities) (Exemptions) (England) Order 1988(b) shall be substituted as follows -

"(2) The condition mentioned in paragraph (1) is that the amount estimated by the authority as the gross cost of carrying out the activity in question through their direct labour organisation or a similar organisation in the immediately preceding financial year does not exceed -

- (a) in the case of the activities mentioned in section 2(2)(a) to (g) of the Act, £100,000;
- (b) in the case of the activity mentioned in section 2(2)(-) of the Act [housing management], £500,000."

(a) 1988 c.9.

(b) S.I. 1988/1372; amended by S.I. 1990/1565.

1994

Secretary of State
for the Environment

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Local Government Act 1988 (Defined Activities) (Exemptions) (England) Order 1988 to provide that the defined activity of housing management shall not be treated as a defined activity if it is carried out by certain defined authorities and the estimated gross cost of carrying out the activity through the authority's direct labour organisation or a similar organisation in the immediately preceding financial year does not exceed £500,000.

DRAFT GUIDANCE: White Collar Services (13 January 1994)**INTRODUCTION**

1. This guidance is issued under the Local Government (Direct Service Organisations) (Competition) Regulations 1993 (SI No 1993/848) ("the Regulations"), which empower the Secretary of State to issue guidance as to how conduct which has the effect of restricting, distorting or preventing competition or is likely to have that effect (referred to in the remainder of this guidance as "anti-competitive conduct") may be avoided, so as to comply with the provisions of Part I of the Local Government Act 1988 ("the 1988 Act"), as amended by the Local Government Act 1992. The Regulations also provide for the Secretary of State to take into account the extent to which there has been a contravention of this guidance in determining whether or not conditions mentioned in Section 7 (7) of the 1988 Act have been fulfilled.
2. This guidance applies only to the defined activities of legal, information technology (IT), finance, personnel, corporate & administrative, construction-related and housing management services. [Authorities should note that this draft does not reflect the Governments final views on services other than legal, where they have yet to complete initial discussions with the local authority associations]. It applies to functional work, that is to say work carried out in order to discharge authorities' own functions. For the purposes of this guidance the term "authority" is defined so as to include local authorities and other defined authorities within the meaning of Part I of the 1988 Act.
3. This guidance replaces the advice given in DOE Circular 10/93, in Welsh Office Circular 40/93 and, in SOEnD Circular 13/93 in so far as it applies to the services mentioned above.
4. This guidance does not reiterate all the matters covered by the Regulations: both need to be studied. Neither is this guidance, nor the Regulations, intended to be exhaustive. Authorities should consider all aspects of conduct, whether covered by the Regulations and this guidance or not, from the point of view of avoiding anti-competitive conduct.
5. When entering into a tendering process authorities should also pay due regard to their obligations under the Treaty of Rome and the EC Public Procurement Directives, and ensure that those obligations are met.

6. This guidance does not consider in detail how local authorities should take into account issues of quality in the tendering process (from specification to evaluation). Advice prepared by the Local Authority Associations in cooperation with the professional bodies for the relevant services will offer guidance on this issue, and local authorities should act in accordance with the procedures outlined in that advice when evaluating tenders in order to ensure evaluation is conducted on a fair and even-handed basis. [The Government have not yet seen a final draft of this advice, and the material in this document may in due course need amendment to reflect details of this advice].

7. In conducting competitive tenders for housing management, local authorities should also take into account the Government guidance on tenant involvement in housing management CCT [to be issued shortly].

SECTION A: CONTRACT STRATEGY

Pre-tender questionnaires

8. When selecting contractors for inclusion on a list of approved contractors or to be invited to submit tenders authorities should avoid the use of unnecessarily detailed questionnaires. They should only seek information which is relevant to the work in question or which is sought for the purpose of selecting those to be invited to tender. This information sought to also be sufficient to allow local authorities to appraise potential tenderers [in accordance with the advice on the assessment of quality.]

Packaging of Work for Tender

9. The Secretary of State accepts that local authorities will have in mind service delivery considerations and desired outcomes and objectives for these services when deciding how best to package work in order to seek competitive tenders. This may result in tendering packages including work from more than one defined activity, including packages which combine both white-collar work and other work subject to the requirements of s.6 of the 1988 Act. In many cases the approach to packaging will be determined by the need to provide support services in a way which meets an authority's particular requirements and objectives. In the case of housing management, for example, the package may be consequent upon an authority's wish to provide a comprehensive housing management service to local residents.

10. Authorities should bear in mind that existing organisational basis of service delivery within the Direct Service Organisation (DSO - in this guidance, the term DSO refers to organisation or team of in-house staff delivering the service in question) or historic working practices may not necessarily be the most efficient or cost effective way of packaging work. It follows from the duty of authorities to avoid anti-competitive conduct

that work put out to tender should be packaged in such a way as to bring it within the scope of a range of contractors.

11. Authorities should, however, avoid packaging which brings together unrelated areas of work (that is the separate items of work they seek to combine are not all essential to the delivery of the outcomes sought where these outcomes are described in terms of the functions to be carried out or customer to be served) into a single proposal for tendering if such packaging is likely to restrict competition by deterring contractors working in only one of the fields concerned. In these circumstances authorities should consider whether they would obtain a better show of competition and better value for money by giving contractors the opportunity to tender for elements of the package separately. Local authorities should bear in mind that, for many of the white-collar services, smaller specialist contractors may offer better quality, and thus better value for money.

12. In packaging contracts, authorities should consider the range of likely suppliers of that service and their likely response to the advertised work. With due regard to their obligations under the EC Public Procurement Directives, they may wish to seek the advice of the relevant professional body on the most appropriate form of packaging. For housing management, local authorities are required by regulations to be made under s.27AA of the Housing Act 1985 to consult tenants on various aspects of housing management, and will wish to take into account tenants' views in deciding on appropriate packaging of work.

13. The Secretary of State is prepared to consider local authorities' arguments for the approach they have taken to packaging work where they can justify it on service delivery grounds as providing the most appropriate form of service. Authorities should, however, be able to demonstrate that they have considered the likely market response and taken account of the preferences expressed by potential contractors for their work.

Maximum and Minimum Size of Housing Management Contracts

14. In defining packages for the purposes of inviting competition, local authorities will be expected to have regard to a number of factors. The relevant considerations are whether packages allow the provision of a responsive service to tenants, encourage cost effective service delivery and reflect natural local areas, with some recognisable local identity. Tendering exercises will also be expected to attract a good show of competition. Small authorities, with up to 7500 dwellings, may put all management work in a single package where they consider this will offer the best service to tenants, offer value for money and attract competition. The Secretary of State considers that larger authorities would normally realise better value for money by seeking tenders for area based contracts of no more than 5000 dwellings.

Maximum Periods for which Tenders are Invited

15. The Secretary of State will expect authorities to consider carefully the period for which they invite tenders for the provision of services. Where the invitation refers to the continuous provision of a service, for example architectural advice or housing management services, then he takes the view that the invitation should be for no more than five years, in order to ensure that the work is again subject to competitive pressures after a reasonable time. Where the invitation refers to the performance of a specific task, for example a specific piece of litigation or single construction project, then it should relate to the duration that task, or to the time for which the work in question is required rather than any other specified period. In either case, the arrangements will have to allow for the completion of tasks underway when the contract ends.

Responsibility for the Competition Process

16. Councillors should ensure that their responsibilities as members of the Council as a whole override any specific responsibility they may hold for supervising, monitoring or overseeing the activities of a DSO. Elected, or co-opted, members of an authority with responsibility for the preparation of a DSO bid should always ensure that, when serving on committees or sub-committees dealing with the relevant operations set out in Regulation 4(3) of the Regulations, they follow the principles set out in the National Code of Local Government Conduct in carrying out those duties. Whilst involvement in overseeing the activities of a DSO is not strictly a "private or personal interest" in terms of the Code, members should treat any such involvement as if it were and disclose it, or if it they think it appropriate, withdraw from committee discussion of tender matters.

Timing of stages in the tendering exercise

17. The Regulations include a series of provisions as to the minimum and, in some cases, maximum periods for specific stages in the tendering process (see Regulations 2, 3 and 5(b)). These Regulations apply where the EC Public Procurement Directives apply.

18. In other cases, minimum or maximum periods of time are not intended to be adopted mechanistically. Authorities should in each case give consideration to, and adopt periods of time for, the various stages of tendering, within the minimum and any maximum periods prescribed, which are appropriate for the tender and type of work in question. The Secretary of State will expect authorities to be able to give reasons for the timetable they have adopted for a tender, if required to do so. The Secretary of State accepts that, where the work for which tenders are sought is linked to specific tasks or projects and the authority

is constrained by the timetable for that work, they may wish to minimise the tendering period, subject to contractors being given adequate time to respond to advertisements and invitations to tender.

SECTION B: CONTRACT DOCUMENTATION

Specifications

19. Authorities will be expected to make available to those invited to undertake work, the specification or, where appropriate, the consultants' brief, the conditions of the contract and tendering conditions including details of the tender evaluation procedure. An authority should give as clear an indication as possible of the range of work likely to be covered by the contract, if necessary illustrating this by examples of recent similar commissions or projects. They should also, where appropriate, outline the basis for payment for services, and give details of the quality of service sought and how this will be monitored.

20. The Secretary of State recognises that the amount of detail will depend on the nature of the work for which tenders are invited, and that where tenders are sought for work likely to vary in its nature, or which is otherwise unpredictable, then the specification will reflect this.

21. Authorities are required to make specifications available for inspection to any persons free of charge, and to supply copies for a "reasonable charge". That term is not defined, and it is for authorities to decide what constitutes a reasonable charge. But, since authorities are under a statutory duty to draw up the specification, they should not reflect the cost of doing so in the charge made for copies. In order to avoid anti-competitive conduct, this charge should be based on the marginal cost of producing and supplying an extra copy.

22. The authority should be prepared to consider proposals from contractors for providing the service which involves a different method of operation to that of the DSO, and should not normally aim to describe procedures or approaches to be adopted, but should instead focus on the output sought. However, the Secretary of State accepts that, for some services, it may be necessary to specify the nature of the work in terms of the process to be followed or the type of professional input which a contractor would be expected to offer, for example, where specific procedures are necessary to ensure compatibility with work performed elsewhere within an authority, or with statutory obligations or an authority's own policy standards. Other than in these circumstances, the document should aim to prescribe the methods of work to be employed in general terms.

23. For housing management services, for example, an authority is required to consult tenants on aspects of the specification. As with other services, the specifications should be framed in terms of outputs sought, rather than a detailed description of the mode of delivery except outputs cannot be clearly defined (eg. the approach to recovery of rent arrears, neighbourhood disputes or racial harassment).

24. Where practicable the document should also set down the standard of performance to be achieved by the successful tenderer. Where appropriate, this should relate to widely accepted professional standards. For certain work, for example litigation, the authority may also wish to specify that the successful contractor nominates named individuals to be responsible for carrying out the work throughout the contract.

25. An authority should only specify that a contractor or a specified number of that contractor's staff should possess relevant professional qualifications (either UK recognised qualifications or European equivalents), where possession of such a qualification is essential to guarantee proper performance of the work. (They may, however, take into account the possession of such qualifications as a measure of the contractors competence when evaluating tenders. If any account is taken of professional qualifications, then the DSO should be assessed on the same basis as external tenderers.

Supporting Material for Tenders

26. The Secretary of State recognises that, for certain work, authorities may wish to obtain from tenderers detailed documentation or other information in support of their tenders. They may, for example, wish to seek information necessary to ensure that the tender's approach is compatible with the authorities service delivery systems or procedures, or further information on precise resourcing levels. Such detailed information should normally only be sought where the specification is such that this information is essential for proper evaluation of tenders, either on grounds of price or quality. In other circumstances, contractors should only be asked to provide general descriptions of the methods of work to be employed, or evidence to support proposed resource levels.

The Terms and Conditions of the Contract

27. The contract, which sets down the binding obligations of the parties, should not impose unduly or unreasonably onerous conditions on the successful tenderer. An authority will be properly concerned to ensure that the contract binds the contractor to provide the service or carry out works as specified. However, authorities should bear in mind that unduly or unreasonably onerous contract requirements may deter potential contractors. Authorities are reminded that Part II of the 1988 Act prohibits local authorities making certain demands as regards workforce matters or requiring, through contractual conditions, that contractors comply with codes of practice or conduct on

these matters (same where permitted by s.18). They may, however, require that the successful contractor follow the relevant professional code of practice where this is generally accepted, or the European equivalent of such codes.

28. Authorities should consider using, where available, standard contract documents, for example, a standard form of contract which is widely approved and recognised.

29. An authority may require that certain members of a contractors staff be located in a particular neighbourhood or district within the authority's area where location in the area is essential to ensure that the authority's service delivery requirements are met. Authorities may, for example, require that contractors have an office or offices in particular areas where this is essential for ease of contact with local people, such as an estate management or revenue collection office, or a 'one-stop shop' for local service delivery. However, the authority may be regarded as having acted in an anti-competitive manner if it stipulates that all staff, other than those in direct contact with service customers, be situated at a particular location where this is not essential to the delivery of the service in accordance with the specification.

30. An authority may require that a contractor should use equipment of a specific type, make or source in carrying out the work but only where this is essential to ensure compatibility with the authorities own systems or procedures, and where they can demonstrate that this is essential on operational grounds to ensure proper provision of the service or where this is necessary to meet health and safety obligations or to comply with an authority's environmental policies. Authorities should note that the use of a single source supplier is subject to the requirements of the EC Public Purchasing Directives.

31. The Secretary of State considers that an authority may be acting in an anti-competitive manner if they include in a contract a requirement that a contractor shall, if appointed, forgo any private or commercial work of the same nature as the work he is appointed to undertake within the authority's area for the duration of his contract with the authority, except where the carrying out of such work would give rise to a clear conflict of interest (for example where lawyers employed to advise on planning matters may also act for potential developers).

32. The risk of such conflicts may, in any case, depend on the nature of the work in question, and authorities should assess the risks in each case. Professional codes of practice advise on the handling of such conflicts of interest, and the advice they offer should normally be sufficient to avoid difficulties. The Secretary of State accepts that, in some cases, it may be necessary to make specific provision in contracts on these matters.

33. Any default process must apply equally to contractors and DSO. If liquidated damages are envisaged as being appropriate, then these must be a genuine and reasonable pre-estimate of the cost that would be incurred in rectifying the default, and must be clearly shown in the invitation to tender. Liquidated damages are not always necessary and authorities should remember that consequential damages are always an implied term of contract unless expressly stipulated otherwise. Any default process must allow the contractor, where practicable, to remedy any default. If the default process is seen to be effectively a penalty, then it becomes unenforceable in English and Scots law. Any arbitrary, unreasonable or potentially unlawful default process is likely to deter contractors and may have an anti-competitive effect.

34. Arrangements for determining the fees paid, for the payment of such fees and for arbitration in the event of dispute should follow established practice within the relevant profession.

SECTION C: TENDERING CONDITIONS

35. A number of tendering conditions need to be considered from the point of view of avoiding conduct which may have an anti-competitive effect.

Performance Bonds and Guarantees

36. Authorities may properly require performance bonds or guarantees from contractors where there is perceived to be a significant risk entailed in awarding work to a contractor. However, they should do so on the basis of a case by case assessment of the risk, and not as a matter of course.

37. The value of the bond should be related to the extra costs which would be incurred by an authority in remedying defects and finding another contractor to do the work in the event of total failure. Authorities should have appropriate contingency plans for dealing with such situations, and should be able to demonstrate and justify how the value of a bond has been calculated.

38. Where guarantees are provided by parent companies it should not be necessary for authorities also to require performance bonds from the parent companies' subsidiary carrying out the work. This applies equally to guarantees provided by companies registered outside the United Kingdom; authorities should satisfy themselves, however, that such guarantees are enforceable in the courts in this country.

39. The Regulations include provisions as to the treatment of allowable and prospective costs. Paragraph 1 of the Schedule to the Regulations describes the method of treating performance

bonds. For the purpose of tender evaluation, "notional premium" means an amount equal to the lowest of the costs of providing a performance bond offered by external contractors.

40. For certain work, it may be appropriate for an authority to require that contractors hold relevant professional indemnity insurance. Where this is the case, that requirement should accord with the normal approach to such insurance recommended by the appropriate professional body.

Quality Assurance Certification

41. For certain activities, few companies as yet possess certification under a quality assurance standard in the European Standard series (BS 5750 in the UK or its equivalent in other member states). In such circumstances a requirement that tenderers should possess certification may represent a restriction of competition, since the absence of certification cannot in itself be considered to indicate that a company is not competent to carry out the work.

42. In any event, tender invitations which refer to certification should:

- (i) allow for tenderers to demonstrate that they are in the process of undergoing certification, or have firm plans to do so;
- (ii) allow for tenderers to demonstrate that they operate equivalent management systems based on the principles of BS 5750.

43. Private contractors and DSOs must be assessed equally. An authority should not normally reject a tender solely on the grounds that a company or DSO does not possess BS 5750 or equivalent certification. The judgement should be made on the ability to perform the work to the specified standards based on all the available evidence.

44. [Advice prepared by the Local Authority Associations in cooperation with the professional bodies for the relevant services offers further guidance on the treatment of quality in tender evaluation, and local authorities are advised to act in accordance with the procedures outlined in this advice].

Cases where work is not awarded to the lowest bidder

45. The Secretary of State accepts that it is for local authorities to decide on the appropriate balance between price and quality in evaluating tenders, in accordance with fair and even-handed procedures. This may, in some cases, lead to a decision to reject a lower bid in favour of the DSO. Where this

is the case, an authority would nevertheless be expected to have specific and well-founded reasons for such a decision.

Post-tender negotiations

46. Negotiations carried out after tenders have been submitted, and before decisions have been taken as to the award of the work, may have the effect of undermining tenderers' confidence in the integrity of the formal tendering process and may indicate that an authority is behaving in an anti-competitive manner. They should therefore only be entered into where some doubt may exist as to quality and/or performance, or where terms and conditions need clarification and mutual agreement. Negotiations may also be necessary where a contractor is successful only in bidding for part of the package of work tendered.

47. Where the authority has taken all reasonable measures to attract competition, but the DSO has submitted the only bid, the authority may enter into discussions, but should not amend significantly the specification upon which bids were invited.

48. Where the authority propose to accept a significant change to the specification, then all tenderers must be given the opportunity to revise their bids or submit fresh bids. In some cases, the change may result in having to start again with a new tendering process, as new bidders may be able to compete on the basis of the new requirement.

Design Contests

49. If a local authority wishes to award architectural, engineering or other work following a design contest, they should nevertheless have regard to the advice in this guidance on specifications, timing of the tendering process and contract and tendering conditions. Interviews with or presentations by contestants should all be conducted on the same fair and even-handed basis, and the same information sought from each contractor. The evaluation panel should reach a decision by assessing work in accordance with clear criteria, following established professional practice as appropriate. Authorities should bear in mind that the provisions of the EC Services Directive will apply to work awarded in this manner where the value of that work exceeds a specified threshold.

Re-tendering

50. There have been instances where an authority has elected not to award the work following a tendering exercise, but to re-tender the contract with the DSO being one of the bidders. An authority must have sound reasons for such action. The DSO should not be given information on the detailed contents of the bids submitted by the previous tenderers, nor any other information which may give it an advantage in re-tendering. The authority

should also ensure that tenderers from the original exercise be given the opportunity to re-tender.

Transfer of Undertakings [The Government are currently consulting on proposed amendments and additions to advice offered to local authorities on the treatment of the TUPE Regulations under CCT. This text does not reflect any new advice]

31. The Transfer of Undertakings (Protection of Employment) Regulations 1981, ("the TUPE Regulations"), provide that, where a "relevant transfer of an undertaking" has taken place, the new employer takes over the responsibility for the employment contracts of the persons employed in that undertaking, who transfer to the new employer on their existing terms and conditions of service. Whether or not there is a transfer of an undertaking depends on the nature of the work and the contractor's proposals for carrying it out.

32. The Government's view on the application of the Regulations in relation to CCT is set out in the Secretary of State for the Environment's and the Secretary of State for Scotland's statements to Parliament of 11 March 1993. In particular, he noted that it was an essential part of competition that authorities should not preclude the consideration of options of service delivery proposed by tenderers by placing any prior restrictions on the arrangements which external contractors or the DSO must adopt, except in cases where such restrictions can be justified by the authority on operational or economic grounds.

53. Where, therefore, an authority seeks, in a tender invitation, to ensure that the successful contractor will be required to take over responsibility for existing staff, and observe existing terms and conditions of service, by:

- specifying expressly that the tenderer should make offers of employment, without operational or economic justification; or,
- specifying that the TUPE Regulations must apply to the contract where it is not clear at the point of inviting tenders that this would necessarily be the case; or,
- seeking to achieve the same purpose by specifying requirements relating to matters other than employment of staff, without operational or economic justification;
- the Secretary of State takes the view that any such requirement may have the effect of restricting, distorting or preventing competition, and may take action accordingly, subject to the facts of the case.

54. The Secretary of State accepts that authorities may wish to refer prospective contractors to the TUPE Regulations. In doing so, however, they should refer to the Regulations in neutral

terms, and should not express a view on the likelihood of the Regulations applying or otherwise, lest this may have the effect of distorting, restricting or preventing competition.

55. Prospective contractors may wish to submit proposals for carrying out a service which would, in their view, involve the transfer of an undertaking. In these circumstances, contractors are likely to need information on the numbers of staff who would transfer, and their terms and conditions of service. The Secretary of State would expect authorities to provide such detail as is necessary for contractors to prepare such tenders.

56. Where a prospective contractor chooses to submit a proposal to which the TUPE Regulations would apply, and which would therefore involve the transfer of existing staff, the Secretary of State takes the view that it would be inappropriate for an authority to take into account redundancy costs of the staff in question when evaluating such a tender.

Tender Evaluation

57. The Regulations allow authorities to take into account, for the purposes of tender evaluation, certain redundancy costs for those who would otherwise continue to be employed by the DSO if it were successful. Authorities should not, however, take redundancy costs into account as a matter of course, but should make a case by case assessment of whether it would be appropriate to do so. The Secretary of State takes the view that, in order to avoid anti-competitive conduct, authorities should not normally take into account any redundancy costs on contracts of one year or less in duration, or equal to or less than £100,000 in value. The failure of the DSO to win such a contract would not normally lead directly to redundancies. Where work is let in a series of small contracts, the Secretary of State will consider carefully local authorities' arguments for taking into account a net cost of redundancy.

58. The number of redundancies assumed for the purpose of such calculations must relate in a demonstrable way to the work concerned. The assumed redundancy costs will depend on the age, length of service and other characteristics of the employees concerned. In identifying those employees for the purposes of the costing exercise, authorities should follow their standard policy for redundancy.

59. Where relevant, the redundancy calculation may involve support staff (eg payroll staff) who would also have to be made redundant in the event of the DSO being unsuccessful. The assumptions and calculations made in respect of support staff should relate in a demonstrable way to the projected DSO redundancies and should similarly follow authorities' standard policy on redundancy.

60. Authorities should be ready to provide the Secretary of State with a detailed account of their assessment of prospective redundancy costs should they be asked to do so, including information on redundancy policy on which the calculations are based, as well as the basis for any support staff redundancies included in the assessment.

61. Authorities should inform contractors when inviting tenders if they intend, where appropriate, to take account of any extraneous cost items in evaluating tenders, and of the cost items to be taken into account, although they need not inform them of the magnitude of those costs.

62. Authorities sometimes permit a representative or representatives of the employees of one of the bidders to make representations to officers or members about their proposals. In order to avoid anti-competitive conduct, an equal opportunity should be offered to the representatives of the employees of other bidders.

63. When assessing the quality of tenders submitted local authorities will be expected to act on a fair and even-handed basis and conduct the evaluation in a non-discriminatory manner. Authorities are advised to follow procedures set out in [advice on quality prepared by the LAAs/professional bodies].

64. Regulations to be made under s.27AA of the Housing Act 1985 will provide a basis for the involvement of local authority housing tenants in the tendering process for housing management services. Local authorities are free to decide how they wish to involve tenants in the process of tender evaluation. However they should bear in mind that Part II of the 1988 Act requires that evaluation must be on the basis of strictly commercial criteria which relate to the price submitted by the contractor and the quality of the service offered. Authorities may also wish to involve others with a legitimate interest in the work (eg. school governors where tenders are for the design of a new school building).

SECTION D: SELECTION OF TENDERERS

65. Authorities need not necessarily restrict the number of contractors invited to tender to the minimum required under Section 7 of the 1988 Act, where more have expressed interest. These provisions do not prescribe a level of competition at which an authority may assume that it has fulfilled the conditions in Section 7(7) of the Act. Rather, they prescribe only minimum levels of competition and, in order to avoid anti-competitive conduct, authorities should not exclude contractors solely on the basis of adhering to these minima.

66. However, there may be circumstances where extending the invitation to all contractors interested in tendering would be wasteful of resources. In these circumstances the exclusion of contractors should be in accordance with good tendering practice and the authority should have regard to the relative size and range of experience of the contractors concerned and whether they have the necessary experience and skills to undertake the work specified. As far as the number of contractors to be invited is concerned, the Secretary of State considers that, generally, a total of four to six (depending on the size of the contract) would be appropriate.

67. This advice should be considered in the context of the requirements of the EC Public Procurement Directives, which make certain stipulations about the selection of tenderers.

68. If an authority intends to use references from other authorities on their experience and knowledge of a contractor, they should ensure the choice of additional referees is such as to ensure a fair and balanced view of the work of that contractor.

SECTION E: TREATMENT OF ASSETS

Availability of premises and other assets

69. Where a local authority requires that, for reasons related to efficient and effective service delivery, a contractor comply with certain contractual conditions on the use of local premises or other similar restrictions on the method of service delivery, then the Secretary of State would normally expect the authority to make available the relevant assets to those invited to tender where they are already in the authority's possession. Making available assets will ensure that contractors who would not be in a position to compete for work without access to such facilities are not excluded from competition. It is for authorities to decide in the circumstances of each case the assets which it would be appropriate to make available in order to facilitate a good show of competition, (subject to conditions in leasing agreements which prohibit such a novation).

70. Authorities can require that the successful tenderer use an asset, for example a building or office, where use of that asset is essential to ensure the efficient and effective delivery of the service to the standards sought, for example because they wish to offer a 'one-stop shop' facility to local people. The Secretary of State does not consider that authorities should be able to require that a successful contractor uses information technology systems which the authority owns or operates, although they should be given the opportunity to do so. However, where contractors opt to use their own systems, it is acceptable for the authority to specify the data to be collected and held by the contractor, the form and frequency of reports to the authority

and arrangements for ensuring the security and confidentiality of data. They will also be able to require that suitable arrangements are made for the transfer of data to local authority records as necessary.

Basis on which assets are made available

71. In order to avoid anti-competitive conduct, authorities must not make assets available to contractors on terms which are onerous relative to the basis on which the DSO uses assets. Where a charge is made to a contractor, it should be calculated on the basis of a commercial rental or hire charge for the premises or other asset concerned. The authority's DSO will be expected to include the cost of using that asset in their bid by virtue of the requirement that they achieve a specified financial objective. Where an asset is offered free of charge the DSO is not, for 1988 Act work, required to make a rate of return on that asset. All parties are thus treated on an equal basis.
72. If a successful contractor does not wish to use premises or certain other assets made available at no charge then these are released for alternative use or disposal. The Secretary of State takes the view that it would be anti-competitive for authorities, when evaluating tenders in these circumstances, not to take into account the benefits of so releasing these assets, just as authorities are permitted to take account of extraneous costs of awarding work to an external contractor. Authorities should therefore credit an appropriate benefit to any bid where the contractor or DSO does not propose to use assets offered free of charge.
73. Some assets, such as mainframe IT systems, cannot, in the short-term, be released for alternative use or disposal. In this case, no credit need be offered, and the [revised s.9 Regulations] provide for the additional costs which would fall to the authority if the DSO were unsuccessful to be taken into account in tender evaluation.
74. This credit should be calculated on the basis of the open market disposal value of the asset. In the case of property, disposal should be assumed to be on an indefinite basis, without restrictions as to future use, and taking account of redevelopment or alternative use potential. The tender invitation should give details of the credit which will be taken into account in tender evaluation should a tenderer not wish to use the asset.
75. When determining the commercial rental on which the charge, or credit, for an asset is to be based, authorities may take into account a potential and more valuable alternative use for land or buildings, where planning permission has been obtained, so as to reflect the full opportunity cost of continuing to use the land or buildings for their existing purpose.

Retention of assets

76. In the event of the DSO being unsuccessful in tendering for a contract involving the use of certain assets, and the successful contractor not requiring them, authorities have expressed the view that it is in their interests to retain those assets to facilitate future rounds of competition. It is for individual authorities to decide whether they wish to retain unwanted assets. However, the Secretary of State considers that the charge, or credit, for that asset should reflect the full value of assets, unencumbered by restrictions imposed by an authority's wish to retain them for further use. To do otherwise may restrict, distort or prevent competition by discouraging contractors who may be able to offer better value for money by using cheaper capital assets.

77. Where an incoming contractor does not wish to make use of assets being made available free of charge, the authority may incur a loss in disposing of those assets. Authorities have previously been allowed to take such losses into account for the purposes of tender evaluation. However, the Secretary of State has reviewed that decision and now considers this inappropriate. The cost of acquiring these assets is bygone expenditure incurred regardless of whether the work is to be contracted out or not. The receipt from the sale, even if less than the bygone expenditure, is a benefit. Therefore, it is not appropriate for any "losses" to be taken into account.

Cancellation of leases and other arrangements

78. The Regulations permit authorities to take into account, for the purposes of tender evaluation, any net costs incurred as a result of the cancellation of leases and other arrangements such as maintenance, service and supply contracts which they have entered into, but for which an incoming contractor would not wish to take responsibility.

Enquiries

79. Any enquiries on this Circular should be addressed to Local Government Division 3, Department of the Environment, Room P1/134, 2 Marsham Street, London SW1P 3EB; Local Government Division, The Scottish Office, Room 6/92 New St Andrew's House, Edinburgh, EH1 3TG; Local Government Reorganisation Group 3, Room 2.002, The Welsh Office, Cathays Park, Cardiff, CF1 3NQ.